IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1521

THE DOW CHEMICAL COMPANY,
Petitioner

v.

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Dow Chemical Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case.

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[1] The National Labor Relations Board and the Chamber of Commerce of the United States were also parties in the proceeding before the Court of Appeals; pursuant to Supreme Court Rule 21(4) they are respondents with respect to this petition, although their interests are not adverse to Dow's.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 524 F.2d 853, —— U.S. App. D.C. —— (*infra*, p. 1a); its order denying rehearing has not yet been reported. The opinion of the National Labor Relations Board is reported at 211 NLRB No. 59, 86 LRRM 1381 (*infra*, p. 26a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 15, 1975. Rehearing was denied on February 4, 1976.

Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C.§ 1254 and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e).

QUESTIONS PRESENTED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, makes it an unfair labor practice for a labor organization to threaten, coerce or restrain any person where an object is to force him to cease doing business with, or cease dealing in the products of, another person.

The principal question presented is whether a union having a primary labor dispute with a producer violates this section when it pickets retailers dealing in the products of the struck producer who are separate and neutral employers with respect to the labor dispute, where the picketing is conducted in a manner calculated to induce members of the public to cease patronizing the retailers, and further

calculated to force the retailers to cease doing business with, and dealing in the products of, the producer in order to escape the substantial economic impact of losses of both customers and revenue, the nature of the retailers' business being such that an appeal to boycott the struck products is tantamount to an appeal not to patronize the picketed retail establishments at all.

An ancillary question presented is whether the Union adequately specified the struck products in its appeal to the public and confined its picketing to establishments actually offering those products for sale.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) are set forth below:

> Sec. 8 [29 U.S.C. § 158] Unfair labor practices.
>
> * * * *
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> * * * *
>
> (4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * *
>
> (b) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *:

Provided, That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution; * * * *

STATEMENT OF THE CASE

A. The Facts

The respondent (hereinafter "the Union") commenced a strike against the Bay City plant (Bay Refining Division) of the petitioner (hereinafter "Dow") in February of 1972. (A. 160a).[2] The struck plant produced gasoline, fuel oil and a number of other hydrocarbon byproducts. Some of the gasoline was distributed to retailers who sold gasoline at stations in the local geographic area under the brand name "Bay".

[2] "A." references are to the record by the page numbers of the Appendix filed by the Union in the proceeding before the Court of Appeals.

At a meeting in February, 1973, after the strike had continued for a year, the Union's membership decided to commence "picketing of gas stations which were a prime outlet for Bay Gas" in order to "attempt to bring pressure on Dow" (A. 162-163a). Thereafter, the Union engaged in some 40 or more instances of picketing at a total of six gas stations in Bay City and nearby Midland, Michigan. (A. 259a). Two of the stations were owned by Central Michigan Petroleum, Inc.; three by Rupp Oil Company, Inc.; and one by Harold Alexander, Inc. The record contains a lengthy and detailed examination of the relationship between Dow and these retailers, which may be summarized briefly as establishing: (1) the retail stations were outlets of three independent corporations in which Dow had no proprietary interest; (2) although dependent upon Dow as a principal source of gasoline supply, the retailers were not contractually limited to purchasing from Dow; and (3) each retailer hired, supervised and determined the working conditions of its own employees and established its own labor relations policies entirely independently of Dow. None of the retailers had a labor dispute with the Union.

All of the stations picketed sold gasoline exclusively under the "Bay" name and displayed "Bay" signs and logos as their insignia (A. 15a, 31a, 72a). Gasoline was the principal product sold at each of the stations. At the five stations operated by Central Michigan and Rupp, gasoline sales accounted

respectively for approximately 81, 85, 91, 98 and 98 percent of total revenues, with the remainder coming from sales of other miscellaneous items and services, sales of which are generally incidental to the gasoline business. (A. 17a, 23a-25a, 30a-33a, 73a). Once having selected a "Bay" service station, customers rarely asked for automotive products by brand name; they generally trusted the selection of their serviceman. (A. 66a-68a). Harold Rupp testified that he could not possibly stay in business offering only these incidental items other than gasoline (A. 68a). Gasoline sales at the station operated by Alexander were described as "our bread and butter" (A. 84a), but the exact proportion of Alexander's revenues which was attributable to sales of Dow gas is not clear since some gasoline produced by other refiners was also sold by Alexander under the "Bay" name.

Some of the miscellaneous items sold in the stations, such as brake fluid and antifreeze, are Dow products (A. 160a-161a); however, neither the retail station operators, (A. 50a, 60a) their customers, (A. 66a-68a) nor even the Union (A. 171a) knew exactly which were the products of the struck plant and which were produced at other, nonstruck Dow plants. With the exception of motor oil, the miscellaneous non-Dow products were not generally competitive with, or substitutes for, the struck products.

The pickets at the gas stations carried signs bearing such legends as "Don't Buy Bay Gas" and "Bay Gas Made by Scabs" in large, prominent red lettering. (A. 19a-20a)[3] Although the Union's president

[3] The description of the signs is also based on photographic exhibits which were lodged with the Court of Appeals.

had instructed the members to "specify in some nature on the signs who we were and that we were on strike against Dow Chemical Company only and not the stations, we were picketing" (A. 165a), he had further explained that this information was not to be in large print on the signs (A. 168a). In accordance with these instructions, such references to the strike against Dow as did appear were in small, obscure black lettering (A. 121a). Moreover, the Union's president knew that some of the signs actually displayed by the Union's pickets referred only to "Bay" without specifying any product or referring to Dow. (A. 175a). Furthermore, when the Union learned that one gas station operator with a Bay sign had protested to the Union's International Staff Representative that the gasoline he was then selling through his pumps did not actually come from the struck plant, the Union continued to picket the station without regard to whether or not the gasoline sold there was in fact the "struck product". (A. 178a).

The Union's pickets conversed with customers entering the picketed stations; while the content of the conversations is not completely known, the result in some instances was that the customers would respond by driving across the street to patronize a competing, non-picketed station. (A. 115a). The Union's president received reports that the picketing of the gas stations was "very effective" (A. 171a) and that "a number of people had deterred [sic] from buying gasoline at the stations," but he did not know, and apparently did not attempt to discover, whether customers continued to cross the Union's picket lines for the purpose of buying non-

struck products. (A. 173a) The effectiveness of the picketing is illustrated by the approximately 20 percent decline in business experienced at one of Rupp's stations during March of 1973, as compared with the previous March, when the strike was in progress but gas stations were not picketed. (A. 36a). At Alexander's station, gasoline sales for the month in which the picketing commenced were down 62,000 gallons as compared with the corresponding month of the previous year. (A. 75a). Moreover, after the picketing commenced, a considerable number of Alexander's customers returned credit cards which had been issued by Alexander and which made no reference to Dow or Bay and could be used to purchase any product sold by Alexander. (A. 106a-108a).

B. The proceedings before the National Labor Relations Board.

Dow filed an unfair labor practice charge against the Union on March 13, 1973.[4] On May 22, 1973, the Chamber of Commerce of the United States (hereinafter the "Chamber") filed a charge substantially similar to Dow's and relating to the same Union conduct. The Board ultimately proceeded on an amended consolidated complaint encompassing both charges.

Upon a joint motion by all parties, the administrative proceeding was transferred to the Board without a hearing before an Administrative Law Judge for

[4] The charge was initially dismissed by the Regional Director for Region 7. An appeal by Dow was sustained by the General Counsel, who remanded the case to the Regional Director with instructions to issue a complaint. (A. 206a)

submission on a stipulated record, which included the transcript and exhibits from a related District Court injunction proceeding[5] and a supplemental stipulation of facts. The Board granted the motion on August 29, 1973. (A. 268a). None of the parties had requested oral argument, but on December 21, 1973, the Board took the unusual action of ordering *sua sponte* that the case be set down for oral argument, "having determined that the instant case raised issues of substantial importance in the administration of the Act." (A. 270a). Oral argument was heard by the full Board on January 7, 1974.

On June 18, 1974, the Board, Chairman Miller and Members Kennedy and Penello concurring, issued its Decision and Order, *infra*, p. 26a.

The Union had contended that because of the business relationships between the stations' operators and Dow, they were not neutral parties entitled to protection from picketing in furtherance of a labor dispute with Dow. The Board easily disposed of this contention. "The short answer to this line of argument is that the Board does not normally predicate loss of neutral status on economic interdepen-

[5] The Board's Regional Director filed a petition for an injunction pursuant to Section 10(l) of the Act, 29 U.S.C. § 160(1) in the United States District Court for the Eastern District of Michigan. The District Court heard testimony on May 23 and 24, 1973. The Union moved for dismissal of the injunction petition on the ground that the evidence showed only permissible consumer picketing. The Union's motion was denied (A. 140a-142a); however the District Court never did issue a final decision on the merits.

dency alone, absent such factors as common ownership or managerial control." (*infra*, p. 33a-34a).

The Union had also contended that consumer picketing aimed at Dow's products was lawful under the *Tree Fruits* decision of this Court.[6] Dow had contended that in the *Tree Fruits* case the Washington State apples which were the struck product were an insubstantial part of the retail business of the grocery stores where picketing occurred, and that the appeal to consumers in that case would not have discouraged consumers totally from patronizing the grocery stores. Dow argued that the likelihood in the instant case that consumers would be induced to totally boycott the picketed retailers was such that this could fairly be found to be an intended result of the Union's conduct.

The Board agreed with Dow's argument that this factual distinction is legally significant. "Where by the nature of the business and of the picketing it is likely that customers who are persuaded to respect the picket signs will not trade at all with the neutral party, we in turn are persuaded that a true *Tree Fruits* situation does not exist, and that we are at the very least required to make our own in-

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[6] *N.L.R.B.* v. *Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58 (1964). The case involved picketing which urged customers of Safeway grocery stores not to purchase a particular brand of apples produced by growers with whom a union had a labor dispute. This Court held that the particular picketing involved did not threaten, coerce or restrain Safeway, and therefore did not violate Section 8(b)(4) of the Act. The case is commonly known as "*Tree Fruits*," a reference to the Tree Fruits Labor Relations Committee, Inc., which filed the unfair labor practice charge.

dependent judgment as to whether the picketing is permissible under the Act." (*Infra*, p. 35a).

The Board reasoned that in *Tree Fruits* it was the minimal impact which the picketing would have had, if successful, upon the total business of Safeway which was the basis of the holding that the picketing in that case did not "threaten, coerce, or restrain" the retailer within the meaning of Section 8(b)(4). The Board found the present case substantially different. Here the picketing was reasonably calculated to induce customers not to patronize the neutral retailers at all, since gasoline sales and minor items incidental thereto comprised most of their business. "Some, at least, would predictably be forced out of business if the picketing were successful, and all would predictably be squeezed to a position of duress, escapable only by abandoning Dow in favor of a new source of supply." (*Infra*, p. 36a). The Board went on to emphasize that it was the predictability of this impact that had led the Board to conclude that the picketing had an unlawful object. Reviewing the intent of Congress in enacting Section 8(b)(4), the Board stated its conclusions as follows:

> "We think that, mindful of the conclusion reached in *Tree Fruits*, fidelity to that congressional intent does not permit so niggardly an interpretation of the terms 'threaten, coerce, or restrain' as would be necessary to find that these terms do not apply, within the meaning of Section 8(b)(4), to what this Respondent is doing to these gas station operators. Accordingly, we find that the picketing violated Section 8(b)(4)(ii)(B) of the Act." (*Infra*, p. 37a).

The Board ordered the Union to cease and desist from engaging in the unfair labor practices found by the Board and to take certain affirmative action designed to effectuate the policies of the Act.

Members Fannings and Jenkins dissented, stating their belief that under *Tree Fruits* picketing which follows the struck goods is lawful, regardless of the character and extent of harm inflicted upon netural retailers.

C. The proceedings before the Court of Appeals.

The Court of Appeals considered the case on the Union's petition for review and the Board's cross-application for enforcement of its order pursuant to Sections 10(e) and (f) of the Act, 29 U.S.C. § 160 (e) and (f). Dow and the Chamber were granted leave to intervene. The case was argued before a panel consisting of Chief Judge Bazelon, Senior Circuit Judge Fahy, and Circuit Judge McGowan, who issued their decision on December 15, 1975, in an opinion written by Senior Circuit Judge Fahy.

The opinion admitted the factual correctness of the distinction drawn by the Board; i.e. that the picketing in *Tree Fruits* was of such a character as to have a "minimal" impact on the Safeway grocery stores, even if successful, while picketing in the instant case threatened the retail gas station operators with the probability of substantial economic injury. (*Infra*, p. 9a) It disagreed, however, with the Board's attribution of legal significance to this factual difference: "While the small part the struck product in the whole of the Safeway business was not overlooked by the [Supreme] Court, it was not

the basis for the decision [in *Tree Fruits*]." (*Infra*, p. 11a).

While admitting that the Board's interpretation "has its persuasiveness" (*infra*, p. 16a), the opinion suggested that the court was entirely free to substitute its own interpretation. The opinion reasoned that the necessity of giving consideration to the applicability of a Supreme Court decision made statutory construction in this case "a judicial function no less than an agency's." (*Infra*, p. 16a). The Court of Appeals did not, therefore, give the Board's decision "the usual deference due an agency's construction of the statute it administers." (*Infra*, p. 16a) The opinion further indicated that the court favored its own interpretation over the Board's under the principle of construction to avoid constitutional doubts. Deference to the Board's construction, even though persuasive, would require the court to resolve an "arguable" First Amendment issue raised by the Union's contention that picketing aimed at consumers cannot be constitutionally enjoined. (*Infra*, p. 16a). The panel therefore granted the Union's petition to set aside the Board's order and denied the Board's petition for its enforcement.

Dow and the Chamber filed petitions for rehearing and suggestions for rehearing in banc, which were denied on February 4, 1976. The order of the full court below disclosed, however, that the judges of the District of Columbia Circuit were closely divided, 5 to 4. Circuit Judges Tamm, MacKinnon, Robb and Wilkey indicated that they would have granted rehearing. (*Infra*, p. 25a).

REASONS FOR GRANTING THE WRIT

A. Clarification by this Court of its *Tree Fruits* decision is needed to resolve questions of substantial importance in the administration of the National Labor Relations Act.

The National Labor Relations Board, the agency charged with responsibility for administering the National Labor Relations Act, characterized the instant case as one which "raised issues of substantial importance in the administration of the Act." (*Infra*, p. 28a). This Court has often cited similar grounds as a reason for granting certiorari.[7]

The history of this case amply illustrates the difficulties encountered in any attempt to perceive the proper application of this Court's decision in *Tree Fruits* to variant factual situations of the sort presented by the instant case. Certainly Dow would contend that certiorari should be granted to consider whether the Court of Appeals has misconceived the meaning[8] or misapprehended the scope[9] of *Tree Fruits*. But even apart from these grounds, it can hardly be denied that the applicability of the *Tree Fruits* decision to the instant case is sufficiently ambiguous to have caused great difficulty for the Board and courts alike. This petition calls upon this Court not merely to correct error but to respond to the urgent need for clarifying the implications of

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[7] See, for example, *United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946); *Rothensies* v. *Electric Battery Co.*, 329 U.S. 296, 299 (1946).

[8] See *Wilkinson* v. *United States*, 365 U.S. 399, 401 (1961).

[9] See *Schlude* v. *Commissioner*, 372 U.S. 128, 130 (1963).

the *Tree Fruits* decision, a need such as the Court has recognized as a reason for granting certiorari.[10]

B. This case requires the decision of questions which this Court did not reach in Tree Fruits.

To keep *Tree Fruits* in its proper perspective, it is helpful to recall that the central issued resolved in that decision was one which is not in contention at all in the present case.

Prior to *Tree Fruits*, Section 8(b)(4) was thought generally to prohibit a union engaged in a labor dispute with one employer from picketing at another neutral employer's premises. Although the statute spoke in terms of "threaten, coerce or restrain", it was widely assumed that "all picketing is obviously conducted to coerce". Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 Mich. L. Rev. 191, 207 (1950). It was this assumption which was contested in *Tree Fruits*, and the only clear meaning of that decision (which is not questioned in the instant case) was a rejection of the then prevailing theory that picketing *per se* is necessarily within the statutory language "threaten, coerce or restrain". This result was required, in the opinion of this Court, by essentially two considerations: (1) the legislative history did not clearly indicate that Congress had determined that all picketing necessarily threatens, coerces or restrains; and (2) such a determination would be suspect under the First Amendment. This much is clearly the holding of *Tree Fruits*.

It is the next logical step in the analysis upon which the present controversy is based and for

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[10] See *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

which *Tree Fruits* does not provide a clear and unambiguous resolution. If picketing cannot be held to "threaten, coerce or restrain" *per se*, then whether or not picketing at secondary premises violates the statute in a particular case must depend upon whether or not it is proven to "threaten, coerce or restrain" neutral employers in fact. In *Tree Fruits* this Court was satisfied that the particular picketing involved did not in fact "threaten, coerce or restrain" the neutral retailer at whose stores picketing was conducted. On this point the majority discussed only the particular factual situation before the Court and resisted the invitation to consider the difficulties which factually variant situations might raise.

There are many factors which may have influenced this Court to find that Safeway was not threatened, coerced or restrained by the picketing in *Tree Fruits* which are absent in the present case. Most important, in the Board's view, was that the picketing in *Tree Fruits* merely asked the public to refrain from buying a single item which was miniscule in the context of Safeway's entire business. Even the most ardent unionists could continue essentially normal patronage of Safeway while simply shifting individual item selection from one brand of apples to another sold by Safeway, or from apples to another fruit sold by Safeway. Safeway probably did not care which particular products its customers purchased, so long as they continued to do their shopping at Safeway.[11]

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[11] Safeway did not participate in any capacity at any stage of the proceedings in *Tree Fruits*, nor did the record indicate that Safeway ever voiced concern over the picketing.

The pickets' appeal in the instant case presents a very different situation. Gasoline occupies a peculiarly preeminent role in the business of a retail gasoline station for two reasons: (1) its sale represents as much as 98% of total station revenue; and (2) such other product sales as there are tend to be accomplished mainly incidentally to transactions in gasoline. In this context, the picketed retailer is not faced merely with a minor shift in the product mix sold, but rather with substantial and potentially disastrous losses of both customers and revenue. These implications are very different in their character and magnitude than those faced by Safeway, and they were plainly a cause of great concern to the gasoline station operators. Did this picketing therefore "threaten, coerce or restrain" these neutral retailers? The Board held that it did, distinguishing *Tree Fruits*, and the Court of Appeals disagreed, insisting upon clinging to the literal language of the *Tree Fruits* decision regardless of the factual differences.

Such a literal approach to the interpretation of this Court's opinions may, as the Court recently cautioned, lead to "absurd and unintended results." *Michigan* v. *Mosley*, —— U.S. ——, 96 S. Ct. 321, 325 (1975). "General expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1945). Dow suggests that the language of the *Tree Fruits* decision must be read in the light of the peculiar facts of that case, bearing in mind, as always, that the Court can seldom, if ever, completely investigate the possible bearing of its opinions on variant situations which may be presented by later cases. See *Cohens* v. *Virginia*, 19 U.S. 264, 399-400 (1821). See also

Green v. *U.S.*, 355 U.S. 184, 197 (1957); *Teamsters Union* v. *Hanke*, 339 U.S. 470, 479-480 (1950); *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 604 (1949); *U.S.* v. *Pink*, 315 U.S. 203, 243-244 (1942) (Stone, C.J. dissenting); *Humphrey's Executor* v. *U.S.*, 295 U.S. 602, 626-627 (1935); *Williams* v. *U.S.*, 289 U.S. 553, 568 (1933); *O'Donoghue* v. *U.S.*, 289 U.S. 516, 550 (1933); *Carroll* v. *Lessee of Carroll*, 57 U.S. 275, 287 (1854).

After comparing the facts of the instant case to those before this Court in *Tree Fruits*, the Board was persuaded that "a true *Tree Fruits* situation does not exist". (*Infra*, p. 35a). Dow suggests that the Board acted properly in not blindly applying the literal language of *Tree Fruits* outside of its proper factual context. As this Court has specifically warned, rigid rules and broad generalizations are not possible in Section 8(b)(4) cases. *Electrical Workers, Local 761* v. *NLRB*, 366 U.S. 667, 674 (1961). Moreover, *Tree Fruits* was decided on the basis of the *Trinity Church* doctrine,[12] and it has long been recognized that cases decided on this basis should be narrowly limited to their specific facts and followed in other situations only with "great caution and circumspection." *Crooks* v. *Harrelson*, 282 U.S. 55, 59-60 (1930).

The question now presented is particularly intriguing, however, for the very reason that, even though not decided, it was not entirely unanticipated in this Court's previous deliberations. Justice Harlan, dissenting in *Tree Fruits*, 377 U.S. at 83, raised

[12] *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), cited in *Tree Fruits*, 377 U.S. at 72.

hypothetically the very question presented by this case:

> "The distinction drawn by the majority becomes even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product. If, for example, an independent gas station owner sells gasoline purchased from a struck gasoline company, one would not suppose he would feel less threatened, coerced, or restrained by picket signs which said 'Do not buy X gasoline than by signs which said 'Do not patronize this gas station'

The majority made no attempt to respond to this hypothetical problem. Dow assumes that in keeping with the usual practice of this Court, the draft of Justice Harlan's dissenting opinion was circulated among all the members of the Court long before the majority opinion was published,[13] and that the majority's silence upon Justice Harlan's gas station hypothetical must therefore have represented a deliberate choice by the majority not to attempt to resolve it. It is therefore not unreasonable to characterize the question raised by this case as one left undecided and deliberately reserved by the Court in *Tree Fruits* for future determinations, a further reason why certiorari should be granted.[14]

C. This case presents a recurrent question upon which judicial opinion is divided.

The aftermath of *Tree Fruits* has been a series of cases in which unions conformed picketing to the

[13] See Clark, *The Supreme Court Conference*, 19 F.R.D. 303, 308 (1956).

[14] Cf. *F.T.C.* v. *Travelers Health Assn.*, 362 U.S. 293, 297 (1960).

literal language of the *Tree Fruits* decision in situations in which it was apparent that the real economic impact of the picketing on neutral parties would be very different from that experienced by Safeway. The Board has developed a policy refusing to extend *Tree Fruits* to such factually distinguishable situations. The Board's policy has found support in reported court decisions arising in several different Circuits. See *Hoffman* v. *Cement Masons Union Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986; *American Bread Company* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969); *Twin City Carpenters Dist. Council (Red Wing Wood Products, Inc.)*, 167 NLRB 1017, *enforced* 422 F.2d 309 (8th Cir. 1970); *Salem Building Trades Council (Cascade Employers Ass'n)*, 163 NLRB 33, *enforced per curiam* 388 F.2d 987 (9th Cir. 1968), *cert. den.* 391 U.S. 965 (1968); *Honolulu Typographical Union No. 37* v. *NLRB*, 131 U.S. App. D.C. 1, 401 F2d 952 (D.C. Cir. 1968). The decision of the court below in the present case undesirably conflicts with an otherwise consistent pattern of authority.

Dow would suggest that the Court of Appeals for the Sixth Circuit has advanced the most workable criteria yet for applying *Tree Fruits*: in *Tree Fruits* consumers could continue their normal shopping at Safeway and still sympathize with the union; the *Tree Fruits* result is inapplicable where "to cease purchasing the single item would almost amount to customers stopping all trade with the secondary employer." *American Bread Company, supra*, at 154.

A close division of judicial opinion within the District of Columbia Circuit itself is apparent not only from the vote on the suggestions for rehearing

in banc in the instant case but also from the striking differences between the opinion in this case and the opinion of a different panel of the same court in the earlier *Honolulu Typographical Union* decision, *supra*.[15] There the same court emphasized the realistic meaning of picketing appeals over superficial attempts to take advantage of the legal concept evolved for the *Tree Fruits* situation. Responding to the argument that the Board's policy of limiting *Tree Fruits* would give broader immunity to those secondary sellers whose total business is indistinguishable from the struck primary products they retail, the court answered that "the law makes distinctions in terms of the tradition and economic realities of Union pressure, even though this may result in differences not easily subject to logical delineation between the scope and kinds of picketing available to unions in different labor circumstances." 131 U.S. App. D.C. at 5, 401 F.2d at 956. Congress, the court then believed, had determined that the neutral's interest in avoiding a boycott is more deserving of protection, and the union's interest in cutting off the primary employer's markets must yield.

The decision of the Court of Appeals for the District of Columbia Circuit in the instant case cannot be reconciled with the pattern which emerges from a fair reading of the other decisions cited above. The Court of Appeals ignored some of these cases

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[15] In addition to resolving conflicts among the different circuits, this Court has previously indicated that certiorari may be appropriate to resolve a conflict in the rulings of a single circuit due to the differing views of the judges composing that court. See *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939).

and made an unconvincing attempt to distinguish others upon the basis of rather attenuated factual differences. Dow suggests that it would be a wiser policy to confront the disharmony and resolve the conflict which now exists. Certiorari should be granted to accomplish this purpose.

D. Failure by the Court of Appeals to accord weight to an administrative construction of the Act conflicts with the decisions of this Court.

It is well established under the decisions of this Court that "not only are the findings of the Board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight." *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 691-692 (1951). Such deference would seem especially appropriate in secondary boycott cases, an area in which this Court has characterized statutory interpretation as an "evolutionary process" in which the Board, with its special appreciation of the complexities of the subject, responds to "unfolding variant situations" over a period of time on the basis of accumulating experience. *Electrical Workers, Local 761* v. *N.L.R.B.*, 366 U.S. 667, 674 (1961). It is apparent that the present case is not an identical recurrence of the *Tree Fruits* situation, but is rather the very sort of unfolding variant situation which calls for the Board's experience and expertise in the evolution of the statute's construction.

While admitting in this case that the Board's position "has its persuasiveness", the Court of Appeals went on to assert that the Board's determination "is not entitled to the usual deference due an agency's construction of the statute it administers; for the case involves the appropriate application of a construction of the statute by the Supreme Court." (*Infra*, p. 16a). The Court of Appeals cited no authority for this rather novel proposition, and Dow suggests that it conflicts with the decisions of this Court.

The rationale advanced by the Court of Appeals for simply substituting its own judgment for that of the Board is not in harmony with this Court's decisions. Where a particular statutory provision has been the subject of both administrative and judicial construction, the Court has held that the agency's interpretation will continue to have persuasive weight unless "so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law." *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39, 52 (1939). In the instant case the Court of Appeals did not even purport to make the finding which, under this Court's decision in *Sanford*, would be required to reject the Board's construction.

A Supreme Court decision should not, as the Court of Appeals has suggested, extinguish the role of the Board. A Supreme Court decision establishes basic objectives; the primary responsibility for adapting those basic objectives to differing situations and changing circumstances must continue to rest with the Board. See *Hudgens* v. *NLRB*, —— U.S. ——, —— S. Ct. ——, 44 U.S.L.W. 4281, 4286 (U.S. No. 74-773, March 3, 1976).

E. Reliance by the Court of Appeals upon the doctrine of construction to avoid Constitutional doubts in this instance conflicts with the decisions of this Court.

The Union advanced the theory that to prohibit peaceful picketing in this case would be unconstitutional under the First Amendment. The theory borders upon being frivolous, inasmuch as this Court long ago held that picketing to accomplish a secondary boycott in violation of the National Labor Relations Act may be constitutionally enjoined. *Electrical Workers, Local 501* v. *NLRB*, 341 U.S. 694, 705 (1951). The Union attempted to distinguish *Electrical Workers* on the basis that the picketing in the instant case was aimed at influencing customers, rather than employees, of the retailers to be boycotted. Since this distinction had been clearly rejected by this Court in *Hughes* v. *Superior Court*, 339 U.S. 460 (1950), the Union's constitutional argument lacked any real substance. The Court of Appeals did not characterize this issue as serious, but merely "arguable" (*infra*, p. 19a). Nevertheless, the Court of Appeals asserted that the doctrine of construction to avoid constitutional doubts required that it reject the Board's construction of the statute merely in order to avoid having to decide this rather simple constitutional issue.

The primary objective of statutory construction is to effectuate Congressional intent. It is clear that in enacting Section 8(b)(4) Congress intended a broad prohibition against all secondary boycotts; it rejected any distinction between "good" and "bad" secondary boycotts.[16] Notwithstanding the narrow

[16] See 93 Congr. Rec. 4198 (remarks of Senator Taft).

exception allowed by this Court in *Tree Fruits*, both the majority (377 U.S. at 64-70) and the dissenters (377 U.S. at 84-92) recognized that picketing aimed at consumers at a secondary retail establishment was generally included within the scope of the Act's prohibitions. The Board found in the circumstances of the instant case that "fidelity to that Congressional intent does not permit so niggardly an interpretation of the terms 'threaten, coerce or restrain' as would be necessary to find that these terms do not apply, within the meaning of Section 8(b)(4), to what this Respondent is doing to these gas station operators." (*Infra*, p. 37a). The canon of avoidance of constitutional doubts does not, under this Court's decisions, give the Court of Appeals a license to frustrate those Congressional purposes which the Board has attempted to effectuate. The decision of the Court of Appeals is in conflict with this Court's characterization of that canon as one which must give way to "the equally well-settled doctrine of this Court to read a statute, assuming that it is suspectible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro* v. *United States*, 335 U.S. 1, 31 (1948).

F. This Court should act to correct the injustice resulting from failure of the Court of Appeals to remand the case to the Board for the consideration of alternative grounds.

The basis upon which the Board made its determination was only one of several alternatives urged by Dow as Charging Party. The Board held that its resolution of the *Tree Fruits* issue made it un-

necessary to consider alternative theories upon which the complaint might have been sustained. The Court of Appeals, in turn, confined its review to the reasons assigned by the Board. Assuming, *arguendo*, that the Court of Appeals correctly held the Board's finding invalid, it would seem only just and equitable to remand the case so that the alternative theories urged by Dow may receive proper consideration.

The record suggests that there at least three arguable alternative theories upon which the Board could have sustained the complaint consistent with the opinion by the Court of Appeals. Full consideration of these alternatives is essential to assure that a just result is reached. If the Union's conduct might be found unlawful on any of several independent theories, it should not be permitted to escape the consequences by merely persuading the Court of Appeals that the one theory which the Board considered dispositive is invalid.

First. The Board found that most of the picketed retailers' business consisted of "gasoline sales and minor items incidental thereto." (*Infra*, p. 36a). The Board concluded from this fact that successful picketing would so predictably have a major economic impact on the retailers that an object of the picketing must have been to "threaten, or coerce or restrain" the retailers within the meaning of Section 8(b)(4) of the Act. The Court of Appeals rejected an economic impact test; however, neither it nor the Board considered an additional issue implicit in the fact that the retailers made sales of minor items *incidental* to gasoline sales. The Board should be given the opportunity to consider whether the appeal of the pickets was truly confined to the struck product or

whether it necessarily encompassed non-struck products whose sales are incidental to gasoline patronage.

Second. There is a very substantial question as to whether the picket signs adequately specified the boycotted product. The Board expressly avoided deciding this question. (*Infra*, p. 29a). The Court of Appeals also avoided deciding the question, but made the gratuitous observation that "we do not believe, given the state of the record, that the wording itself of any picket signs led consumers to believe the picketing was directed to other than Bay gas". (*Infra*, p. 4a). Since, of course, the court was discussing a possible finding of fact which the Board has not yet made, the court's belief is immaterial. Moreover, the court appears to have misapprehended the standard to be applied if the Board should take up this question. The record need not include proof that consumers were in fact deceived. "The dispositive factor is the *probable* effect of the picketing upon the consumer." *Kaynard* v. *Independent Routemen's Association*, 479 F.2d 1070, 1073 (2d Cir. 1973) (emphasis added); see also *Hoffman* v. *Cement Masons Union, Local* 337, 486 F.20 1187, 1192 (9th Cir. 1972), *cert. denied*, 411 U.S. 986.[17]

Third. A final theory, which the Board did not find it necessary to consider but which seems obvious beyond all argument, relates only to the picketing of retailer Harold Alexander Inc. Dow was not Alex-

[17] Indeed, the picket signs found inadequate in *Kaynard*, *supra*, were virtually identical in the nature of their deficiencies to the signs used by the Union in the present case and the court in *Kaynard* was satisfied by proof in the form of photographic exhibits similar to those lodged with the Court of Appeals in this case.

ander's sole source of gasoline, and Alexander's use of multiple sources of supply raises a question which must be resolved before the complaint can properly be dismissed. When the Union picketed Alexander, was he in fact selling the struck product? The record indicates that at the time of the picketing Alexander was selling gasoline from a source other than Dow, that he so notified the Union, and the Union continued to picket anyway. (A. 178a). It is therefore quite clear that the Union was not appealing to consumers to refrain from buying the struck product but rather to boycott Alexander because he had previously sold, or might at some future time again sell, the struck product. The Union has never offered even the slightest justification for the obviously illegal course of conduct, and justice requires that the Board be given the opportunity to consider finding a violation on this basis.

CONCLUSION

For the foregoing reasons, The Dow Chemical Company respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1632

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
DOW CHEMICAL COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Intervenors.

Argued May 22, 1975

Decided Dec. 15, 1975

* * * *

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

Carl B. Frankel, with whom Michael H. Gottesman, Washington, D.C., was on the brief for petitioner.

John H. Ferguson, Atty., N.L.R.B., with whom John S. Irving, Deputy Gen. Counsel, Patrick Har-

din, Associate Gen. Counsel, and Elliott Moore, Deputy Associate Gen. Counsel, N.L.R.B., were on the brief for respondent.

William A. Jackson, with whom Robert E. Williams, was on the brief for intervenor, The Dow Chemical Co.

Gerard C. Smetana, Chicago, Ill., with whom Milton A. Smith, Washington, D.C., Lawrence M. Cohen and Steven R. Semler, Chicago, Ill., were on the brief for intervenor The Chamber of Commerce of the United States.

Before BAZELON, Chief Judge, FAHY, Senior Circuit Judge, and McGOWAN, Circuit Judge.

FAHY, Senior Circuit Judge:

The Union petitions for review of an order of the Labor Board which holds that the Union had violated section 8(b)(4)(ii)(B)[1] of the Labor Act by

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[1] Section 8(b)(4)(ii)(B) of the National Labor Relations Act, *as amended* by the Labor-Management Reporting and Disclosure Act of 1959, is codified as 29 U.S.C. § 158(b)(4)(ii)(B). In relevant part it is reproduced, in context, below:

"It shall be an unfair labor practice for a labor organization or its agents—

* * * *

"(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

* * * *

"* * * *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

engaging in a secondary boycott to be described. 211 NLRB No. 59. The Board has cross-applied for enforcement of its order.

I

The controlling facts are not in dispute. The Union, while on strike against the Bay Refining Division of the Dow Chemical Company in Bay City, Michigan, picketed six gas stations in the surrounding area. The stations, as the Board stated, derived "their revenues largely from the sale of this gasoline, marketed under the trade name of 'Bay'. The picket signs asked consumers to Boycott Bay gaso-

line."[2] The percentage of Bay gas revenues to the respective total revenues of the stations was approximately as follows: Of the $280,000 gross annual revenue of one station 81% to 86% came from the sale of this gas; about 85% of the gross sales of $140,000 at a second; at a third station, in operation only about six months, $39,000 of its $40,000 gross revenues was due to Bay gas. The Board stated that this station, however, "leases its servicing facilities to an independent mechanic, and neither the lease rental nor the income of the mechanic (both unknown) is included in the $40,000 figure." A fourth station had gross revenues of $68,000, of which 91% came from "Bay gas and oil and other Dow products such as radiator sealer, brake fluid, and windshield solvent". At a fifth station, 98% of its gross revenues of $45,000 was attributable to this gas. The sixth station, referred to as Alexander's, grossed altogether about $1,200,000 a year. Regarding this station the Board stated: "It is also a General Tire dealership. Its fuel (gas and diesel oil) sales account for 60 to 65 percent of gross revenues," and, the Board continued:

> This station sells gas other than Bay brand, and Alexander's owner, while at one point in his testimony estimated that Bay represented about 75 percent of his fuel sales, later stated that for the current year he did not know how much

[2] We do not believe, given the state of the record, that the wording itself of any picket signs led consumers to believe the picketing was directed to other than Bay gas. As shall appear, however, we limit our decision respecting the validity of the order under review to the reasons assigned by the Board for holding the picketing to have been unlawful under Section 8(b)(4).

> of the gas he sold was Bay. While it is not entirely clear from the record, it would appear that potential customers would not generally have known that gas other than Bay was available at the station.

Thus, if Bay gas accounted for about 75% of its fuel sales and its fuel sales accounted for 60 to 65 percent of its gross, Bay gas accounted for less than 50% of its gross revenues.

All six stations marketed products other than Bay gas. The variety of these products was quite great in the aggregate, but the percentage of revenue from them is as above stated.

The essential facts regarding the picketing we think are fairly stated in the dissenting opinion of Members Fanning and Jenkins as follows:

> . . . the picketing of the six retail gas stations was at all times peaceful . . . . The record also reveals that the picketing did not cause any employee to stop working nor otherwise interfere with deliveries to or pickups from the picketed sites, nor in any manner obstruct customer ingress and egress. The evidence affirmatively shows that the pickets stationed themselves on sidewalk locations away from entrances or exit driveways, that they did not appear until the station opened, and that they departed before it closed. The evidence also discloses that the . . . pickets limited their appeal to the struck product—"Bay gasoline." The legends on the picket signs generally stated: "Don't Buy Bay Gas," "Boycott Bay Gas," and "Bay Gasoline Made by Scabs."

In *Labor Board* v. *Fruit Packers*, 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964),[3] the Court held that a union did not violate section 8(b)(4) by peacefully picketing Safeway Stores, with whom it had no dispute, urging their customers not to buy Washington State apples, purchased by the Safeway Stores from firms with whom the union did have a labor dispute.

In the present case the Board, deciding first that the six stations were neutral in the Union's dispute with Dow Chemical, notwithstanding certain close business relationships between the stations and Dow aside from their purchase of Bay gas, held the result depended upon whether the *Tree Fruits* decision of the Supreme Court applied. Being of the view that it did not, the Board's conclusion of the unlawfulness of the picketing under section 8(b)(4) followed. The Union, while not altogether ignoring the questioned relationship of the stations with Dow as it bears upon the neutrality of the stations,[4]

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[3] This case is frequently referred to as *Tree Fruits*, which derives from the name of the organization of apple growers which filed the charges before the Board: Tree Fruits, Inc. [hereinafter *Tree Fruits*].

[4] The Union's brief speaks of an "economic interdependence between Dow and the six picketed retailers . . . ." The Union argues that, if anything, such an interdependence tends to make picketing of the secondary more akin to primary picketing: "increasing the mutual interdependence between struck supplier and retailer serves to increase not decrease the 'primary' character of the picketing." Brief at 24. Further, it is urged, "when the struck goods rise toward being the sole product of the secondary seller, he may, by virtue of his economic interrelationship with the primary supplier, become an 'ally' of the latter and thus lose his neutral status." Brief at 24-25. The Union suggests that the retailers might have to be considered as allies of Dow because of their "closely intertwined economic interdependency." The court will not upset the Board's finding of neutrality, but agrees that the putative alliance between a primary and a secondary selling almost exclusively the goods of the primary weakens the force of an "economic impact" test.

assumes the neutral status of the gas stations in relying now primarily upon the applicability of *Tree Fruits*.

The Board accurately described as follows the holding of the Supreme Court in *Tree Fruits*:

> that Section 8(b)(4) does not proscribe peaceful consumer picketing which is employed only to persuade customers not to buy the struck product, as opposed to picketing to persuade consumers to cease all trading with the secondary retailers.

Considering the factual situation in *Tree Fruits*, however, the Board interpreted the Court's decision as follows:

> In *Tree Fruits*, the Supreme Court majority, finding that Section 8(b)(4) did not prohibit all peaceful consumer picketing at secondary sites, decided that the minimal impact the picketing there would have had, if successful, upon the total business of the secondary retailer would not justify a conclusion that an object of the union was to persuade the retailer to discontinue handling the struck product to cut its losses. It was on that basis, in our opinion, that it held that the picketing in that case did not 'threaten, coerce, or restrain" the retailer within the meaning of Section 8(b)(4).

As to these six gas stations, however, the Board saw a substantially different situation, stating it as follows:

> . . . the picketing was reasonably calculated to induce customers not to patronize the neutral parties, in this case the gas station operators, at all. Even though some of the stations involved sell tires and provide repair service, which special aspects of their business might be relatively unimpaired, most of their business is gasoline sales and minor items incidental thereto. Some, at least, would predictably be forced out of business if the picketing were successful, and all would predictably be squeezed to a position of duress, escapable only by abandoning Dow in favor of a new source of supply. It is not only the potential impact of the picketing, however, that distinguishes this case from *Tree Fruits*. It is, more importantly, the predictability of such impact that leads us to conclude that the picketing had an unlawful object.

Our disagreement with the conclusion thus reached is not conceived as a failure to accord due weight to a conclusion of the Board in a respect committed to its special expertise. Our position is due to a failure of the Board in our opinion to accord to peaceful picketing, directed to a struck plant which is marketed at a secondary site, the favorable consideration to which it is entitled under *Tree Fruits* in determining both the object of the picketing under section 8(b)(4) and the duress the section tolerates in the circumstances of this case. We have a problem, also, with respect to the degree of success the Board contemplates in drawing a conclusion upon the supposition of successful picketing.

It is undoubtedly true that if the picketing in *Tree Fruits* were successful, the impact upon the total business of the Safeway Stores would be minimal. In contrast, considering the nature of the gasoline service station business, it is indeed likely that a successful consumer boycott of Bay gas would have substantial economic impact upon these six retail outlets. However, the Board was not unanimous that it was the limited economic impact on Safeway which rendered lawful the picketing in *Tree Fruits*. Nor did our court so interpret *Tree Fruits* in *Honolulu Typographical Union No. 37* v. *NLRB*, 131 U.S.App.D.C. 1, 401 F.2d 952 (1968). The *Honolulu* court at least left open much that the Board considers the Supreme Court had foreclosed in *Tree Fruits*:

> We need not decide in this case, nor do we intimate a view on, the question whether a secondary seller who sells only the struck primary product may be picketed even though the appeal necessarily amounts to a request that consumers cease all patronage. That was, in substance, the hard problem posed by the *Tree Fruits* [] dissenters. . . .

Id. at 956, n. 9.

In our view the decision of the Supreme Court may not be limited in its application to a factual situation in which the struck product constitutes only a small part of the business of the secondary retailer; though the facts of the case decided are as we have stated, we think the reasoning of the opinion —its governing principles—formulated in light of the legislative history of section 8(b)(4), are not con-

fined to the factual situation which was before the Court. The Court stated:

> We have examined the legislative history of the amendments to § 8(b)(4), and conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an "isolated evil" believed to require proscription of peaceful consumer picketing at secondary sites, was its use to persuade the customers of the secondary to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute. This is not to say that this distinction was expressly alluded to in the debates. It is to say, however, that the consumer picketing carried on in this case is not attended by the abuses at

> which the statute was directed. [footnote omitted.]

377 U.S. at 63-64,[5] 84 S.Ct. at 1066.

While the small part the struck product had in the whole of the Safeway business was not overlooked by the Court, it was not the basis for the decision. In considering the important question of the lawfulness of peaceful picketing at a secondary site, limited to publicizing a labor dispute with a primary employer, the Court did not focus upon the minimal impact of successful picketing in determining that the picketing did not have an illegal "object" within the meaning of section 8(b)(4). A broader view of the problem of peaceful picketing directed only to the struck product was considered. The Court accordingly reversed the decision of this court when the case was before us as *Fruit and Vegetable*

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[5] Again the Court explained:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [footnote omitted.]

377 U.S. at 72, 84 S.Ct. at 1071.

Packers & Warehousemen v. *NLRB*, 113 U.S.App. D.C. 356, 308 F.2d 311 (1962). The Court held we had erred in remanding the case to the Board on the theory that the ultimate question of threat, coercion or restraint condemned by section 8(b)(4)[6] depended upon whether or not the picketing in fact had caused or was likely to cause a substantial economic impact on the secondary retailer.

III

Consider the application of *Tree Fruits* to the picketing of Alexander's gas station. The relevant facts have been set forth above in Part I. As there stated it is probable that more than 50% of Alexander's annual gross revenues are derived from the sale of products other than Bay gas. This picketing, we think, cannot reasonably be held to have been aimed at "all trade" of Alexander's under the reasoning of the Court in *Tree Fruits*. As the Court there held, picketing "confined as it was to persuading customers to cease buying the product of the primary employer," 377 U.S. at 71, 84 S.Ct. at 1071, did not fall within the area Congress clearly indicated an intention to prohibit under section 8(b)(4)(ii)(B) and, therefore, did not "threaten, coerce, or restrain" Safeway.[7] The composition of

[6] See footnote 1, *supra*, for text of the statute.

[7] This court's opinion in *Honolulu Typographical Union No. 37* v. *NLRB*, *supra*, characterizes the impact which pickets have upon persons who, though not fully in sympathy with the labor union, may be very hesitant to cross its picket lines:

> The restraint generated by the need to cross any such picket line may entirely inhibit consumers who are not whole-hearted union men but are unwilling to be readily identified as hostile or indifferent. There is no similar impact where the picketing acquiesces in the crossing of the picket line but merely urges that the consumer be selective on the inside. It is that sort of limited picketing message that *Tree Fruits* held outside the spirit of § 8(b)(4)(ii)(B). 401 F.2d at 957.

Here, however, restraint is muted, and the applicability of *Tree Fruits* strengthened by the fact that the overwhelming proportion of service station customers arrive by and conduct their transactions from their vehicles.

this statement by the Court is critically important. The Court did not say that the picketing in *Tree Fruits* did not threaten, coerce or restrain Safeway and therefore did not fall within the area Congress intended to prohibit by section 8(b)(4). The Court said that since the picketing was not conduct of the kind which Congress intended to prohibit by that provision, it followed that it did not threaten, coerce or restrain the secondary within the meaning Congress attached to the provision. It was not one of the "isolated evils" intended to be prohibited by section 8(b)(4). The Court viewed Congress as having determined that the possible loss to a secondary caused by this means of publicizing a labor dispute with the producer of the struck product, when weighed against a policy favoring the right peacefully to publicize the dispute, did not outweigh the right.

IV

The factual difference between Alexander's and the other five stations does not lead to a different legal conclusion. The economic loss due to picketing at the other stations directed against Bay gas might or might not be very severe. One does not know

how successful it would be. There is little in *Tree Fruits* to support a different conclusion with respect to the five other stations from that which we reach in Alexander's case, notwithstanding a high percentage of their gross revenues are attributable to sales of the struck product. As stated by Mr. Justice Harlan in dissenting from the Court's position in *Tree Fruits*:

> . . . it cannot well be gainsaid that the rule laid down by the Court would be unworkable if its applicability turned on a calculation of the relation between total income of the secondary employer and income from the struck product.

377 U.S. at 83, 84 S.Ct. at 1077. Mr. Justice Harlan prefaced these observations by the following:

> The distinction drawn by the majority becomes even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product. If, for example, an independent gas station owner sells gasoline purchased from a struck gasoline company, one would not suppose he would feel less threatened, coerced, or restrained by picket signs which said "Do not buy X gasoline" than by signs which said "Do not patronize this gas station." . . .

377 U.S. at 83, 84 S.Ct. at 1077. The opinion of the Court in *Tree Fruits* seems to point to no such "unworkable" standard by which to determine lawfulness. To distinguish between the stations in here applying section 8(b)(4) would be inconsistent also with the Court's reversal of our remand of the *Tree Fruits* case for Board consideration of the economic impact which the picketing actually caused or was likely to have caused.

In some situations the validity of a regulation does depend, not upon the fact of particular conduct but upon the degree of the association of the conduct with a congressional purpose. *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937). In according to employees, however, the right to publicize in a peaceful manner their dispute with a primary party by making it known at a secondary site where the primary's struck product is offered for sale, we think the Court did not consider that the lawfulness of the exercise of the right depended upon differences in the degree of the possible economic impact upon the secondary; an unlawful object was not to be imputed from the possible economic effect of the picketing if it was peaceful and directed only to the struck product. This we think is the situation even though the economic effect were predictably severe if the picketing became very successful. As the dissenting Board members stated in the present case, "the appeal did not extend beyond Bay gasoline, the struck product"; therefore, nothing in the Union's conduct "goes beyond the limits approved in Tree Fruits." With such an appeal any coercion which might grow out of the fact that sales of Bay gas represented most of the station's gross revenue is not unlawful under section 8(b)(4), for the object of the appeal is not condemned by that section. The picketing was not a signal for conduct on the part of anyone except as an appeal to the public not to purchase Bay gas.[8]

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[8] Signal picketing is peaceful picketing at the site of the secondary which is engaged in for the purpose of "signalling" to the employees of a secondary a desire that they engage in a sympathy strike. *See Electrical Workers* v. *Labor Board*,

No compulsion was exerted upon employees, or upon the public other than the communication of a desire that the public respond to the Union's request not to buy Bay gas and by so responding to aid its side in the controversy with Dow Chemical. The public was not asked to abstain from all trade with the gas station. This differentiates the case from *Honolulu Typographical Union No. 37* v. *NLRB*, *supra*, and *American Bread Co.* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969). The appeals to the public in those cases, as the courts held, called for boycotting of more than the struck product. In those "merged product" cases, it was simply not possible to "follow the struck goods" either because those goods were intangible (such as advertising) or because as ingredients in the products of the secondary (baked goods in restaurant meals) they lost their identity.

V

The Board's position has its persuasiveness. It would be more persuasive were the Board free of *Tree Fruits*. Its position is not entitled to the usual deference due an agency's construction of a statute it administers; for the case involves the appropriate application of a construction of the statute by the Supreme Court. This is a judicial function no less than an agency's. Moreover, the decision of the Supreme Court and our application of it are influenced by a rule of statutory construction which requires the courts to avoid unnecessary confrontation with the constitutional guarantee of freedom of speech:

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341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299 (1951); *National Maritime Union of America, AFL-CIO* v. *NLRB*, 342 F.2d 538, 545-546 (2nd Cir. 1965).

> The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same.

Jones & Laughlin, *supra*, 301 U.S. at 30, 57 S.Ct. at 621. In *Tree Fruits* the Court stated:

> Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. . . . Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendement.

377 U.S. at 62-63, 84 S.Ct. at 1066.

When *Tree Fruits* was before this court, Judge Bazelon pointed out for the court the "cases which teach that when two interpretations are possible, courts must construe a statute narrowly to avoid reaching constitutional issues. We must also give full consideration to the stated desire of key legislators to avoid constitutional encroachments." 308 F.2d 311, at 317.[9]

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[9] The court held that section 8(b)(4) did not ban all secondary consumer picketing, stating:

> Viewed as a whole, the statute does not reflect Congress' intent to ban all secondary consumer picketing. What Congress has said is that it shall be an unfair labor

Mr. Justice Black, disagreeing with the Court in *Tree Fruits* as to what Congress intended—being of the view that peaceful consumer picketing of a secondary employer was intended to be proscribed as unlawful under section 8(b)(4)—would have held the statute so construed to violate the guarantees of the First Amendment, and for that reason joined the Court in setting aside the Board's order. 377 U.S. at 76, 84 S.Ct. 1063, *et seq.* Mr. Justice Harlan, with Mr. Justice Stewart, were of the opinion that neither section 8(b)(4) nor the First Amendment protected the picketing; and the Board by its limitation upon consumer picketing of a peaceful character held lawful in *Tree Fruits*, gives rise to but does not pass upon a First Amendment issue similar to that avoided by the Supreme Court,[10] and now

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> practice for a union "to threaten, coerce, or restrain any person engaged in commerce * * * where * * * an object thereof is * * * forcing or requiring any person to cease * * * selling * * * the products of any other producer * * *." Each of these terms has a meaning; each must be given effect. None can be ignored or repealed by reference to the legislative history. It is significant that when Congress wanted to outlaw picketing *per se*, it knew how to do so, as is evidenced by § 8(b)(7), which forbids a union in certain circumstances "to picket or cause to be picketed, any employer" if its object is to force him to recognize an uncertified union.
>
> As we construe the statute, it condemns not picketing as such, but the use of threats, coercion and restraint to achieve specified objectives.

Id.

[10] We note that this industry is such that if the Board's rationale is applied, a union may effectively be limited to picketing at a primary site and on the premises of a few secondaries such as Alexander's.

avoided by this court in our interpretation of *Tree Fruits*.

We think that in light of *Tree Fruits* we may not hold Congress intended by section 8(b)(4) that the exercise of the arguable First Amendment right should turn for its lawfulness upon a factor exceedingly difficult to subject to line-drawing, and as to which a union exercising the claimed right might have poor information as to where to draw the line.

The petition to set aside the order of the Board is granted, and the application of the Board for its enforcement is denied.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 74-1632

[Filed Jan. 15, 1976, Robert A. Bonner, Clerk,
United States Court of Appeals for the
District of Columbia Circuit]

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

DOW CHEMICAL COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Intervenors

JUDGMENT

Before: Bazelon, Chief Judge; Fahy, Senior Circuit Judge and McGowan, Circuit Judge

THIS CAUSE came on to be heard upon a petition filed by Local 14055, United Steelworkers of America, AFL-CIO, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, and representatives, on June 18, 1974, and upon a cross-application filed

by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 22, 1975, and has considered the briefs and transcript of record filed in this cause. On December 15, 1975, the Court being fully advised in the premises, handed down its decision granting the petition for review and denying the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the petition for review filed by Local 14055, United Steelworkers of America, AFL-CIO, to set aside the order of the Board be and it is hereby granted; and that the application of the Board for enforcement of said order of the National Labor Relations Board in said proceeding be and it is hereby denied.

/s/ David L. Bazelon
DAVID L. BAZELON
Chief Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Charles Fahy
CHARLES FAHY
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Carl McGowan
CARL MCGOWAN
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX C

Orders of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 74-1632

[Filed Feb. 4, 1976, Robert A. Bonner, Clerk,
United States Court of Appeals for the
District of Columbia Circuit]

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

DOW CHEMICAL CO., CHAMBER OF COMMERCE OF THE UNITED STATES
Intervenors

Before: Bazelon, Chief Judge; Fahy, Senior Circuit Judge and McGowan, Circuit Judge.

ORDER

On consideration of intervenors' petitions for rehearing, it is

ORDERED by the Court that intervenors' aforesaid petitions are denied.

Per Curiam

For the Court:

ROBERT A. BONNER, Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 74-1632

[Filed Feb. 4, 1976, Robert A. Bonner, Clerk,
United States Court of Appeals for the
District of Columbia Circuit]

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

DOW CHEMICAL CO., CHAMBER OF COMMERCE OF THE UNITED STATES
Intervenors

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

Intervenors' suggestions for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

For the Court:

ROBERT A. BONNER, Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
Chief Deputy Clerk

Circuit Judges Tamm, MacKinnon, Robb and Wilkey would grant intervenors' suggestions for rehearing *en banc*.

APPENDIX D

Decision and Order of the National Labor Relations Board

211 NLRB No. 59

MFJKP
D—8528
Bay City and
Midland, Mich.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 7—CC-743

Case 7—CC-756

LOCAL 14055, UNITED STEELWORKERS
OF AMERICA, AFL-CIO

and

THE DOW CHEMICAL COMPANY

and

THE CHAMBER OF COMMERCE OF THE UNITED STATES

DECISION AND ORDER

Upon unfair labor practice charges filed on March 13, 1973, by The Dow Chemical Company, herein called Dow, and on May 22, 1973, by The Chamber of Commerce of the United States against Respondent, Local 14055, United Steelworkers of America, AFL-CIO, the General Counsel of the National Labor

Relations Board, by the Regional Director for Region 7, issued a consolidated amended complaint, on May 31, 1973, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the consolidated amended complaint and notice of hearing were served on the Respondent and the Charging Parties. Thereafter, Respondent filed a timely answer denying the commission of any unfair labor practices. A hearing before an Administrative Law Judge was scheduled for June 18, 1973.

Meanwhile, pursuant to the provisions of Section 10(1) of the Act, a petition for an injunction was filed by the Regional Director for Region 7, on behalf of the National Labor Relations Board, in the United States District Court for the Eastern District of Michigan. A hearing on that petition was held on May 23, 1973, before Hon. Thomas P. Thornton, United States District Judge. Thereafter, on August 23, 1973, all parties herein joined in a motion before the National Labor Relations Board that the instant consolidated proceeding be transferred to the Board without a hearing before an Administrative Law Judge, and that the entire record consist of the formal papers, the official record in the district court proceeding including transcript and exhibits, and certain stipulated facts. On August 29, 1973, the Board granted this joint motion and transferred the instant proceeding to itself.[1] Thereafter,

[1] No further proceedings have ensued, nor has a decision been rendered in the district court.

the General Counsel, the Respondent, and the Charging Parties filed briefs.

On December 21, 1973, the Board, having determined that the instant case raised issues of substantial importance in the administration of the Act, ordered that this case be set down for oral argument before the Board. Oral argument was heard on January 7, 1974.

Upon the entire record in the case, the Board makes the following findings:

I. Jurisdiction

The consolidated amended complaint alleges and the answer admits that The Dow Chemical Company in 1972, a representative year, in the conduct of its Bay Refining Division located in Bay City, Michigan, sold in excess of $500,000 worth of products, of which goods valued in excess of $50,000 were shipped directly to points located outside the State of Michigan. The answer also admits, and we find, that The Dow Chemical Company is a person engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The consolidated amended complaint alleges and the answer admits that Harold Alexander, Inc., Rupp Oil Company, and Central Michigan Petroleum, Inc., are persons engaged in commerce within the meaning of Sections 2(6) and (7) and 8(b)(4) of the Act. In the absence of facts either in the pleadings or elsewhere in the record sufficient to prove the last-mentioned allegations, and since jurisdiction is otherwise established to our satisfaction, we need

not make any findings regarding the "commerce" status of these businesses.[2]

II. The Labor Organiaztion Involved

Local 14055, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The facts we rely on are undisputed. The Dow Chemical Company has its Bay Refining Division in Bay City, Michigan, where it produces gasoline and other products. Respondent was, at the times pertinent to this proceeding, on strike against the Bay Refining Division. Respondent picketed at six gas stations deriving their revenues largely from the sale of this gasoline, marketed under the trade name of "Bay." The picket signs asked consumer to boycott Bay gasoline.[3] All of the gas stations involved

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[2] The Dow Chemical Company being the "primary employer" herein, we assert jurisdiction on the basis of its engagement in commerce without regard to the "commerce" status of Harry Alexander, Inc., Rupp Oil Company, and Central Michigan Petroleum, Inc., who are the "secondary employers" for purposes of this case. *Sheet Metal Workers International Association Local Union No. 299, AFL-CIO, and Allen Stout, its Agent (S. M. Kisner and Sons)*, 131 NLRB 1196; *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (New Power Wire and Electric Corp.)* 144 NLRB 1089, fn. 1.

[3] A typical sign read: "Don't Buy Bay Gas." Other signs omitted the word "Gas." Our resolution of the legal effect of the picketing makes it unnecessary for us to pass upon the alleged failure of the signs to specify adequately the boycotted product.

are independent, in the sense that none is operated, either wholly or jointly, by Dow.

Three of the stations, located in Bay City, are operated by Rupp Oil Company which, in addition to operating several retail Bay gasoline stations, is the area wholesale distributor for Bay gasoline. While not owned or controlled in its day-to-day operations by Dow, the Rupp distributorship was created with the aid of Dow's endorsement as cosigner of a bank note for a loan to Rupp of $116,000. One of the conditions of this endorsement is that Dow must agree to any purchases or expenditures made with this money. Rupp's wholesale supply is maintained in tanks owned by Dow adjacent to the Bay refinery. On at least one occasion during the strike, Dow employees performed a maintenance operation on the tanks, namely, the installation of gauges. Each of Rupp's three retail gas stations in question is leased by the landowner to Dow, and subleased by Dow to Rupp Oil Company. At two of the stations, at 248 Washington Street and 2100-22nd Street, the rental Rupp pays to Dow is based on gallons of gasoline sold. The third station, at 1017 Marquette Street, is on land owned by Rupp's principal, Harold Rupp, and his wife, who lease it to Dow, which in turn subleases it to Rupp Oil Company for the same rental as provided for in the primary lease. The purpose of this leaseback arrangement does not appear. Dow owns the "Bay" insignias at all three stations, and the gas pumps at the Marquette and 22nd Street stations. At 22nd Street, it also owns a hoist, a carwasher, battery charger, racks and counters, and other personal property.

Central Michigan Petroleum, Inc., operates two of the picketed gas stations located in Midland, Michigan. Central Michigan, like Rupp, also wholesales gasoline. Also like Rupp, Central Michigan is a lessee to Dow with respect to these stations. One of them is actually owned by Dow and the other is leased to Dow and subleased to Central Michigan. The terms of neither of these leases appear in the record, except that a Dow representative testified that he thought the subleased station was rented for the same rental Dow pays. Both stations carry the "Bay" insignia.

The remaining gas station involved is operated by Harold Alexander, Inc., on Euclid Avenue, Bay City, on property owned by Harold Alexander, Inc., leased to Dow for a fixed rental, and leased back to Alexander for a rental based on its gasoline sales. Alexander also leases to Dow the Washington Street gas station which Dow subleases to Rupp Oil Company and, apparently, one of the Midland stations which Dow subleases to Central Michigan Petroleum.[4]

Among the three Rupp Oil Company stations, the one on Washington Street has gross revenues of about $280,000 a year, of which from 81 to 86 percent comes from the sale of Bay gas. It is also a General Tire dealership. The 22nd Street station grosses about $140,000, about 85 percent from Bay

[4] Central Michigan's general manager testified that the land was owned by Harold Alexander. A Dow representative testified that it was owned by a firm known as Bay General. Dow's brief to the Board cites the former testimony in presenting its version of the facts, but inadvertently states that the property was owned by Dow, leased to Alexander, and subleased to Central Michigan.

gas, and the Marquette Street station had only operated for about 6 months at the time of the hearing, and had sold $39,000 worth of Bay gas out of $40,000 in gross revenues. The Marquette station, however, leases its servicing facilities to an independent mechanic, and neither the lease rental nor the income of the mechanic (both unknown) is included in the $40,000 figure.

The two stations operated by Central Michigan Petroleum had only been in operation a few months at the time of the hearing. One had gross revenues of $68,000, of which 91 percent came from Bay gas and oil and other Dow products such a radiator sealer, brake fluid, and windshield solvent. The other station had gross revenues of $45,000, of which about 98 percent was from Dow products.

The Harry Alexander, Inc., station grosses about $1,200,000 a year. It is also a General Tire dealership. Its fuel (gas and diesel oil) sales account for 60 to 65 percent of gross revenues. This station sells gas other than Bay brand, and Alexander's owner, while at one point in his testimony estimating that Bay represented about 75 percent of his fuel sales, later stated that for the current year he did not know how much of the gas he sold was Bay. While it is not entirely clear from the record, it would appear that potential customers would not generally have known that gas other than Bay was available at the station.

It is the contention of the General Counsel and the Charging Parties that by its picketing of these independent gas stations Respondent sought to coerce their operators with an object of forcing them to cur-

tail or cease doing business with Dow, in violation of Section 8(b)(4)(ii)(B). Respondent defends its picketing by asserting that the station operators are not neutral parties entitled to protection from picketing in furtherance of a labor dispute with Dow, and that its picketing at the premises of these retailers of Dow's gasoline, even if they are neutral parties, is lawful under the *Tree Fruits* case[5] as consumer picketing aimed at Dow's product only.

A. *Neutrality of the Picketed Stations*

Where the business enterprise at which alleged secondary picketing takes place is operated with such identity and community of interests with the person having the primary labor dispute as to negative the claim that it is a neutral enterprise, we have held that it is not then the kind of third party who was intended to be protected by Section 8(b)(4).[6] Here, where there is no question of the gas stations being "allies" or "joint employers" with Dow, as those terms have been used in prior cases, Respondent would have us translate the whole complex of business relationships between the stations' operators and Dow, including the lease arrangements, into such a surrender of neutrality. The short answer to this line of argument is that the Board does not normally predicate loss of neutral status on economic interdependency alone, absent such factors as common

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[5] *N.L.R.B.* v. *Fruit and Vegetable Packers & Warehousemen, Local 760* [*Tree Fruits Labor Relations Committee, Inc.*], 377 U.S. 58 (1964).

[6] *Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Acme Concrete & Supply Corp.)*, 137 NLRB 1321, 1324.

ownership or managerial control.[7] None of the facts relied on to persuade us of the unity between Dow and each of the operators is so exceptional as to warrant, in our judgment, departing from this policy in the instant case.

B. *The Applicability of the Tree Fruits Doctrine*

The second question posed by the set of facts before us is the lawfulness of the picketing in light of the *Tree Fruits* decision, *supra*. In that case a majority of the Supreme Court held that Section 8(b)(4) does not proscribe peaceful consumer picketing which is employed only to persuade customers not to buy the struck product, as opposed to picketing to persuade consumers to cease all trading with the secondary retailer. The majority stated at one point that: "Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product." [8]

Respondent Union in the instant case argues that the majority holding in *Tree Fruits* is necessarily applicable irrespective of the extent of disruption of the retailer's business by a successful consumer boycott of the struck product. The Charging Parties and the General Counsel emphasize, on the other

[7] See *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Association, Local 418, AFL-CIO (Continental Grain Company)*, 155 NLRB 402, 403-406; *Local 379, Building Material & Excavators, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Catalano Bros., Inc.)*, 175 NLRB 459, 459-460, 469; *Drivers, Warehouse & Dairy Employees, Local No. 75 (Seymour Transfer, Inc.)*, 176 NLRB 530, 533.

[8] 377 U.S. at 70.

hand, that the Washington State apples which were the struck goods in *Tree Fruits* were an insubstantial part of the retail business of Safeway, the retailer involved, and that a boycott limited to those apples would not have discouraged consumers totally from patronizing Safeway, while such an effect is likely in the case of the gas stations involved here.

We think this factual distinction does indeed have significant legal consequences. Where by the nature of the business and of the picketing it is likely that customers who are persuaded to respect the picket signs will not trade at all with the neutral party, we in turn are persuaded that a true *Tree Fruits* situation does not exist, and that we are at the very least required to make our own independent judgment as to whether the picketing is permissible under the Act.[9] Arguably, certain *dicta* in *Tree Fruits* goes so far as to compel us to find a violation in such circumstances,[10] a point which we need not decide.

In *Tree Fruits*, the Supreme Court majority, finding that Section 8(b)(4) did not prohibit all peace-

[9] See *Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (American Bread Company)*, 170 NLRB 91, 93, enfd. 411 F.2d 147 (C.A. 6, 1969).

[10] For instance: "[W]hen consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." 377 U.S. at 72.

ful consumer picketing at secondary sites, decided that the minimal impact the picketing there would have had, if successful, upon the total business of the secondary retailer would not justify a conclusion that an object of the union was to persuade the retailer to discontinue handling the struck product to cut its losses. It was on that basis, in our opinion, that it held that the picketing in that case did not "threaten, coerce, or restrain" the retailer within the meaning of Section 8(b)(4).

Here, the situation is substantially different. We find, as we did in the *American Bread Company* case, *supra*, footnote 9, that the picketing was reasonably calculated to induce customers not to patronize the neutral parties, in this case the gas station operators, at all. Even though some of the stations involved sell tires and provide repair service, which special aspects of their business might be relatively unimpaired, most of their business is gasoline sales and minor items incidental thereto. Some, at least, would predictably be forced out of business if the picketing were successful, and all would predictably be squeezed to a position of duress, escapable only by abandoning Dow in favor of a new source of supply. It is not only the potential impact of the picketing, however, that distinguishes this case from *Tree Fruits*. It is, more importantly, the predictability of such impact that leads us to conclude that the picketing had an unlawful object.

In *Cascade Employers Association*,[11] we said that Congress did not intend to confine Section 8(b)(4)

[11] *Salem Building Trades Council, AFL-CIO (Cascade Employers Association, Inc)*, 163 NLRB 33, 35, enfd. *per curiam* 388 F.2d 987 (C.A. 9, 1968), cert. denied 391 U.S. 965.

to a strict and precise definition of terms which would limit its application in protecting neutral employers. We think that, mindful of the conclusion reached on the facts of *Tree Fruits*, fidelity to that congressional intent does not permit so niggardly an interpretation of the terms "threaten, coerce, or restrain" as would be necessary to find that these terms do not apply, within the meaning of Section 8(b)(4), to what this Respondent is doing to these gas station operators. Accordingly, we find that the picketing violated Section 8(b)(4)(ii)(B) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

Upon the basis of the foregoing findings of fact and upon the entire record in this case, we make the following conclusions of Law:

1. The Dow Chemical Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 14055, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By its picketing at the premises of Harold Alexander, Inc., Rupp Oil Company, and Central Michigan Petroleum, Inc., in furtherance of a dispute with The Dow Chemical Company, Respondent

has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local 14055, United Steelworkers of America, AFL-CIO, Bay City, Michigan, its officers, agents, and representatives, shall:

1. Cease and desist from threatening, coercing, or restraining Harry Alexander, Inc., Rupp Oil Company, Central Michigan Petroleum, Inc., or any other person, where an object thereof is to force or require any of them to cease using, selling, handling, transporting, or otherwise dealing in the products of The Dow Chemical Company, or to cease doing business with The Dow Chemical Company.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix." [12]

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by a duly authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the said Regional Director copies of the aforementioned notice for posting by Harry Alexander, Inc., Rupp Oil Company, and Central Michigan Petroleum, Inc., these companies willing, at the picketed gas stations.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. June 18, 1974.

EDWARD B. MILLER, Chairman

RALPH E. KENNEDY, Member

JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBERS FANNING AND JENKINS, dissenting:

Contrary to the views of our colleagues, we find no support in the statute, the teachings of *Tree Fruits*,[13] established Board doctrine, or the economic realities involved herein for the conclusion that the Union's consumer product picketing of six gas stations marketing Dow Chemical Company's "Bay" gasoline violated Section 8(b)(4)(ii)(B) of the Act.

The facts are uncontroverted. The Respondent was on strike against the Bay Refining Division of the Dow Chemical Company in Bay City, Michigan, which produces gasoline and related products. In furtherance of this dispute the Respondent engaged at six gas stations in picketing which urged a consumer boycott of the major product manufactured by the struck refinery—gasoline marketed by Dow under the "Bay" label.

The record is clear that the picketing of the six retail gas stations was at all times peaceful and directed only at the consuming public. The record also reveals that the picketing did not cause any employee to stop working, nor otherwise interfere with deliveries to or pickups from the picketed sites, nor in any manner obstruct customer ingress and egress. The evidence affirmatively shows that the pickets stationed themselves on sidewalk locations away from entrances or exit driveways, that they did not appear until the station opened, and that they departed before it closed. The evidence also discloses that the picketing was in conformity with

[13] *N.L.R.B.* v. *Fruit and Vegetable Packers & Warehousemen, Local 760* [*Tree Fruits Labor Relations Committee, Inc.*], 377 U.S. 58 (1964).

its avowed consumer boycott purpose in all substantial aspects and that the pickets limited their appeal to the struck product—"Bay gasoline." The legends on the picket signs generally stated: "Don't Buy Bay Gas," "Boycott Bay Gas," and "Bay Gasoline Made by Scabs."

It is undisputed that all the picketed locations sell products and services other than Dow gasoline. Indeed, the Harold Alexander Co., Inc., station sells a certain percentage of non-Dow gasoline. Moreover, Dow gasoline is clearly not merged into the nonstruck products or services so as to physically prevent the purchase of one without the other. It is possible to buy tires, car accessories, golf balls, and charcoal or have a car washed or repaired without buying Bay gasoline at the stations.

Thus, it appears that the only essential difference between the instant factual situation and that involved in the *Tree Fruits* decision is that here the Respondent is engaged in consumer picketing of a specific brand of gasoline rather than of Washington State apples, and that this gasoline in question is a much more important component of the stations' income than were the apples of Safeway's income in *Tree Fruits*.

Tree Fruits held that consumer picketing, asking customers not to buy the struck product, is lawful because it is part of, or confined to, the primary dispute. Such picketing becomes unlawful only when it extends beyond the struck product to embrace other products or other parts of the business of the person selling the struck product. The Supreme Court made this crystal clear, in defining the difference thus:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchase from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [377 U.S. at 72.]

Since Respondent's appeal did not extend beyond Bay gasoline, the struck product, nothing in its conduct goes beyond the limits approved in *Tree Fruits*.

The majority considers consumer picketing to be unlawful if "it is likely that consumers who are persuaded to respect the picket signs will not trade at all" at the picketed establishment. They rely on the Court's statement that "Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer" is unlawful (377 U.S. at 70), and perhaps also on the Court's condemnation of "consumer picketing [which] is employed to persuade customers not to trade at all with the secondary employer" in the part of the decision set out above. But this reliance is misplaced. "All trade" which

it was unlawful to shut off in *Tree Fruits* was the trade including items *other* than the struck product. The vice in appealing for such action lies not in the fact that all trade is sought to be ended, but in the fact that, where the struck product is only part of the goods sold by the picketed employer, an appeal to end all trade with him is necessarily an appeal to cease buying nonstruck products as well as the struck product. The decision plainly indicates that, whether all trade or a major fraction of it is in the struck product, an appeal not to buy the struck product is lawful. This is clear from the Court's conclusion that "when consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute." (377 U.S. at 72), and that the evil at which the statute was aimed was the use of consumer picketing:

> to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. [377 U.S. at 63.]

As the Court said in footnoting the "not to trade at all" prohibited type of picketing, the distinction is between "merely to 'follow the struck goods' and picketing designed to result in a generalized loss of

[business] . . ." (377 U.S. 64, fn. 7). And yet again in explaining this language, it drew the same distinction between "a public appeal directed only at a product which results in a decline of 25% in . . . sales of that product" and an "appeal . . . that the public cease all patronage . . ." (377 U.S. at 72, fn. 20).

The majority rests its decision principally on the ground that, because the struck product, gasoline, is so dominant and overwhelmingly important a proportion of the service stations' business, an appeal to customers not to buy it will, where it is effective, persuade customers not to patronize the service stations at all. But the Court specifically recognized this argument about degree of impact and the probability that the consumer picketing "provokes the public to stay away from the picketed establishment." (377 U.S. at 71). Indeed, Mr. Justice Harlan made this same point in his dissent. And the Court rejected this argument unequivocably, saying, "Be that as it may . . . Congress has never adopted a broad condemnation of peaceful picketing, such as that urged upon us by petitioners . . ." (377 U.S. at 71).

Apart from the effect of inducing customers to stay entirely away from the service stations, the majority concludes that because the picketing of struck apples in *Tree Fruits* would have "minimal impact" on Safeway's total business and the picketing of gasoline here (if successful) would have a major, possibly devastating, impact on the service stations' business, this increase in impact causes the picketing to violate the Act. That is, the more effective

the picketing, the greater the possibility of its being unlawful. But the Act makes no such distinction, and in *Tree Fruits* the Court, as with other arguments advanced by the majority, expressly rejected this one also. The same argument had been made by Mr. Justice Harlan in his dissent, and the court of appeals, and the Supreme Court held:

> We disagree . . . with the Court of Appeals that the test . . . is whether Safeway suffered or was likely to suffer economic loss. A violation of § 8(b)(4)(ii)(P) would not be established, merely because respondents' picketing was effective to reduce Safeway's sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller. [377 U.S. at 72-73]

The majority's reliance on *American Bread*[14] is misplaced. There the struck product was bread, the consumer picketing was of a restaurant serving the bread as part of its meals, and the appeal was to

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[14] *Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local 237, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (American Bread Company)*, 170 NLRB 91, 93, enfd. 411 F.2d 147 (C.A. 6, 1969). In agreeing with his colleagues that this picketing was violative of the Act, Member Jenkins relied solely on the fact that Local 327 failed to take precautions for allaying any misgiving that might arise concerning the picketing and further assure all parties, including customers, that its picketing was focused solely on the Employer's bread. (170 NLRB at 93, fn. 6.) Similarly, the court also relied on conduct by the picketing Union which showed that its objective was aimed at employees of secondary employers. (411 F.2d at 154-155.) These factors are not present here.

patrons not to buy the bread. Such picketing was held to be unlawful because the diners could not choose to refrain from buying the bread without also refraining from buying the entire meal, so that the nonstruck products which comprised the rest of the meal were necessarily within the reach of the picketing appeal. There is no such merger or incorporation of the struck gasoline here into any other product or service, and the consumers can readily choose not to buy Bay gas without affecting whatever other products or services might be available at the service stations. Since this distinction, the lack of any appeal necessarily affecting neutral products, is the foundation of *Tree Fruits*, *American Bread* can have no application here.[15]

How the "close confine[ment] to the primary dispute" held to make consumer picketing lawful in *Tree Fruits* becomes farther removed from the primary dispute when the struck product becomes a larger percentage of the total business of the picketed employer, the majority does not explain. Both logic and experience would lead to the opposite conclusion, that such increasing mutual interdependence between the struck supplier and the retailer would increase the primary character of the picketing. Indeed, the facts here show that the statutory concept of neutrality tends to lose its substance as the

[15] Member Jenkins has not adopted the "merged product" doctrine. See his dissents in *Honolulu Typographical Union No. 37, AFL-CIO*, 167 NLRB 1030, 1033, enfd. 401 F.2d 952 (C.A. 9, with the court deriving the secondary object in part from handbills which stated, "Do not patronize this establishment."); *Los Angeles Typographical Union No. 174*, 181 NLRB 384.

struck goods rise toward being the sole or nearly sole product handled by the retailer.[16]

[16] Thus, Rupp Oil Company which operates three of the stations involved in this proceeding is the "exclusive" wholesale distributor of Bay Refinery products. Written consent of Dow's general manager is apparently required before it can distribute products to any service station, fuel oil dealer, or other person or retailer in Bay County. It was Dow, not Rupp, who selected the site for the bulk plant from which Bay Gas is distributed to Rupp's retail outlets. The tank farm is on a site to which Bay gasoline could be delivered by direct pipeline from the adjacent Bay refinery. Dow constructed and owns the tanks, owns the property on which they are located, and during the picketing Dow used employees in the struck bargaining unit to install guages in the tanks. Furthermore, Dow not only cosigned the Rupp's bank note making Rupp's dealership possible, but it approves the amount and type of Rupp's insurance and monetary reserves and maintains the right to examine Rupp's balance sheet. The three Rupp Oil stations operate retail sites which are all leased or subleased from Dow, and Dow owns the pumps and a long list of property used by the stations. The rent at two of the stations is based on the gallons of Bay Gas sold.

Similarly, Central Michigan Petroleum, Inc., operates two of the picketed gas stations. Like Rupp, Central leases the stations from Dow. One of the stations is actually owned by Dow (Saginaw station) and the other is leased to Dow and subleased to Central Michigan. Like Rupp, Central Michigan is also a wholesale distributor of Bay Refining products, although the extent of Dow's control does not appear to have been reduced to a written distributorship agreement. The arrangement further raises questions not only of the economic dependency of Central Michigan on Dow, but whether the Saginaw station is in fact a "primary" site on the basis of the Board's conventional legal standards. (See *International Brotherhood of Teamsters, Chauffeurs, Warehousemen*

Our colleagues assert that, in addition to potential impact, "it is, more importantly, the predictability of such impact" which warrants finding an unlawful object. But if the impact is permissible, as they seem to concede and as *Tree Fruits* plainly holds, the probability of the impact can hardly be relevant. Are unions required to picket only known antiunion neighborhoods, or to picket only very high-priced stores whose customers might be expected to have little interest in unions? Activity which is sufficiently primary in character may lawfully be carried on, even if the effect is to close down the employer, and regardless of whether this outcome is likely or remote. The activity does not become less primary by reason of any such effect. Since

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and Helpers of America, AFL-CIO (Alexander Warehouse & Sales Co.), 128 NLRB 916.)

Finally, Harold Alexander, Inc., the sixth station picketed, subleases its site from Dow pursuant to a fixed rental on property owned by Alexander and leased by Dow. On two occasions Dow paid for the replacement or repair of underground tanks and has also assumed half the cost of certain card material. The rental, like the two Rupp stations above, is also based on the sales of gasoline. Alexander purchases an indefinite amount of gasoline other than the Dow brand, and there is some question from the available facts whether Alexander has complete freedom to make unlimited outside purchases.

These facts are of a type common where a retailer deals solely or principally in products supplied by another; they are recounted here not to show an "agency" or other relation between the supplier and the retailers, but to show the economic realities underlying their relation. Obviously, these economic circumstances pose an issue whether neutrality can have any substantial meaning where such interdependence exists.

Tree Fruits held the picketing here to be sufficiently primary in character to be lawful, it does not become less lawful because it reaches a major and possibly decisive portion of the employer's business, and thus increases the likelihood that the employer may close down entirely.

A constitutional problem lurks within the majority's view. The picketing here was peaceful, limited to the struck product, did not interfere with deliveries or customer access, did not induce or attempt to induce the service station employees to interrupt their work, and involved no means proscribed by the statute. That is, the picketing here was no more than speech concerning the Union's primary dispute over the production of Bay gasoline. To prohibit it, as does the majority, "might collide with the guarantees of the First Amendment," as the Court noted in *Tree Fruits*. (377 U.S. at 63.)

In short, the majority extracts and fastens upon the Court's phrases such as "not to trade at all" and "shut off all trade," and gives them a literal and rigid meaning quite different from that made clear by the context and by the circumstances and issues which the Court in *Tree Fruits* addressed. This meaning is that espoused in the *Tree Fruits* dissent and by the court of appeals which the Supreme Court reversed, a meaning expressly and repeatedly rejected by the Court. Our colleagues commit the same error which the Court there cautioned against, ignoring "the rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." (377 U.S. at 72.) Thus the majority, mired in the remembrance of things past, is now repeating

the mistake which led to the Board's original error in *Tree Fruits.*

For these reasons, we dissent, and would dismiss the complaint.

Dated, Washington, D.C. June 18, 1974.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT, by picketing their gas stations, threaten, coerce, or restrain Harry Alexander, Inc., Rupp Oil Company, Central Michigan Petroleum, Inc., or any other person, where an object thereof is to force or require any of them to cease using, selling, handling, transporting, or otherwise dealing in the products of The Dow Chemical Company, or to cease doing business with The Dow Chemical Company.

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated ——— By ———
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulvard, Detroit, Michigan 48226, Telephone 313—226-3200.